CALISTA CORPORATION
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*Transmitted electronically to:* ***http://www.acq.osd.mil/dpap/dars/section811.html*** *and* ***tribal-consultation@omb.eop.gov***

Federal Acquisition Regulatory Council
Attn: Mr. Edward Loeb, Director Acquisition Policy Division

Re: Calista Corporation's Consultation Comments on Section 811 of the National Defense Authorization Act of 2010; 48 C.F.R. Parts 6 and 19

Dear Mr. Loeb:

Calista Corporation ("Calista"), an Alaska Native Claims Settlement Act corporation, appreciates the opportunity to engage in formal Tribal Consultations with the Federal Acquisition Regulatory Council ("FAR Council") as required by Executive Order 13175, in order to comment on the FAR Council's development of changes to the Federal Acquisition Regulation ("FAR") to implement Section 811 of the National Defense Authorization Act of 2010. *See* Public Law 111-84; 75 Fed. Reg. No. 168 (August 31, 2010). The effect of Section 811 on the ability of Native Americans and Alaska Natives to compete for and receive contracts under the Small Business Administration's 8(a) Business Development Program cannot be measured and implemented without Tribal Consultation. Calista believes that this Tribal consultation and the subsequent implementation of these regulations will be one of the most important decisions to be made by the federal government for Native American tribal entities since the federal decision to grant citizenship to Native Americans in 1924.

At the outset, Calista wishes to acknowledge that the Native-specific benefits of the 8(a) Program have allowed Native Americans and Alaska Natives to establish substantial economic benefits for the Native community that provide exceptional levels of jobs, renewal, and hope to thousands of Natives in some of the most poverty-stricken areas of the United States. Therefore, it is troubling that Section 811 as written eradicates the provisions that provide the underpinning upon which many successful Native Enterprises depend. Further, it is absolutely critical that the Federal Government's decision on these regulations not cause backwards momentum on this vital program which allows all Native American tribal entities to create economic opportunity for its members or shareholders in areas throughout the nation. There is no other program that promotes economic participation for Native American tribal entities off reservation or in the case of Alaska Native Corporations, anywhere in the country where the federal government offers federal contracts. If the goal of this consultation is to be meaningful, in good faith, and entered into on a government-to-government basis as required by Executive Order 13175 and the President's memorandum to executive agencies of November 5, 2009, this consultation must lead to regulations that do not hinder or retard the existing vibrant contracting atmosphere that existed prior to the passage of Section 811.

Section 811 establishes a new requirement for contracting officers to provide a written justification and approval ("J&A") by the head of a federal agency before awarding any sole-source contract to a Native 8(a) Enterprise for an amount exceeding $20 million. Federal agencies will no longer be able to award sole-source contracts to Native Enterprises when the

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value exceeds $20 million without first providing the required J&A, unless (i) the contracting officer justifies in writing the use of a sole-source contract, (ii) such justification is approved by a senior acquisition official designated to approve contract awards for amounts comparable to that contract, and (iii) the written justification and related information are made public by the agency.

Calista does not support Section 811 in its current form for the following reasons, among others. First, based on the manner in which Section 811 was drafted, it specifically targets only Native 8(a) Enterprises (*i.e.*, businesses owned by Indian Tribes and Alaska Native Corporations), which in itself is inherently suspect and in violation of the government-to-government relationship established in Executive Order 13175 and the President's November 5 memorandum. While Section 811 does not eliminate Native 8(a) Enterprise contracting per se, it requires Native 8(a) Enterprises to participate in a new approval process that is not presently required and effectively abolishes the long-standing exemption to limits on Native 8(a) sole-source contract awards.

The J&A requirement will have a deleterious effect on the procurement market for Native Enterprises and grievously suppress the award of sole-source contracts in excess of $20 million because Section 811 is not clear as to whether the $20 million threshold applies to the base year of the contract *or* to the entire term of the contract. Many Native 8(a) contracts are for a base year plus option years, so this lack of clarity could lead to erroneous implementation of Section 811. For example, a contracting officer interpreting the $20 million limitation as a term-of-contract amount rather than a per year amount would effectively limit a Native Enterprise to a lower sole-source contract amount. In such a situation, Native Enterprises would be at a competitive disadvantage compared to non-Native 8(a) program sole-source participants. In addition, Section 811 could cause federal contracting personnel to shun Native 8(a) Enterprises due to the additional time and administrative burdens created by the J&A procedures. Moreover, Section 811 could become the first step on a slippery slope requiring all federal agencies to adopt similar J&A procedures for Native 8(a) sole-source contract awards in excess of $20 million.

Section 811 as drafted should not be implemented because it would eviscerate the economic development opportunities provided to and for the benefit of Native Enterprises under the 8(a) Program. To avoid Section 811's negative impact on the Native community and to prevent unintended consequences that could further impede the economic development of Native Enterprises, Section 811 must be revised to (i) state that the J&A requirement operates only when a contract has a base year amount in excess of $100 million and (ii) state in uncertain terms that the $100 million limitation is a yearly rather than term-of-contract amount.

Additionally, the regulations must make clear to contracting officers that the J&A process should be simple and easy to accomplish by a contracting officer, involving a short memorandum explaining how the contract benefits the government and how it meets the agency's small business contracting goals. The regulations must also require that the time for review and approval of a J&A should be short, no more than 10 days, and that a J&A shall be presumed valid unless disapproved by any reviewing official within that 10-day time period. These regulations must re-empower contracting officers to fully and aggressively reinvigorate the Native 8(a) contracting process, which has been stalled by the uncertainty caused by the passage of section 811.

If these regulations do not make clear to contracting officers that the President's policy is the continuation and reinvigoration of the Native American 8(a) contracting process, then these regulations will not be successful and will not fulfill the requirements of Executive Order 13175 and the President's November 5 memorandum.

Regrettably, Section 811 is an unfortunate example of needless changes to a federal Program that is working as intended and is a testament to the government's commitment to the Native community and a government-to-government success. Section 811 should not become operative unless and until the FAR Council has fully analyzed and determined its true impact and effect on the contracting process for Native Enterprises, the federal agencies involved and their personnel.

Thank you for the opportunity to comment on Section 811. We look forward to the FAR Council's response to the comments it receives on this important federal acquisition policy.

Respectfully,

CALISTA CORPORATION

Andrew Guy
Acting President/CEO & General Counsel